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265 NLRB No. 21

D--9438
Santa Monica and
Ontario, CA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GROUP W CABLE, INC.[1]

and

Case 31--CA--12287

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES AND
MOVING PICTURE MACHINE
OPERATORS OF THE UNITED STATES
AND CANADA, AFL--CIO

DECISION AND ORDER

Upon a charge filed on June 29, 1982, by International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL--CIO, herein called the Union, and duly served on Group W Cable, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 31, issued a complaint on July 13, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and

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[1] Respondent's name appears as corrected by the Acting Regional Director. Respondent was designated as ''Theta Cable of California'' in 261 NLRB No. 175 (1982).

notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on May 28, 1982, following a Board election in Case 31--RC--5141, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[2] and that, commencing on or about June 7, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On July 21, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On August 2, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on August 6, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

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[2] Official notice is taken of the record in the representation proceeding, Case 31--RC--5141, as the term ''record'' is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See LTV Electrosystems, Inc., 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); Golden Age Beverage Co., 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); Intertype Co. v. Penello, 269 F.Supp. 573 (D.C.Va. 1967); Follett Corp., 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent basically contends that the certification of the Union in the underlying representation case is invalid because the Union committed objectionable conduct which interfered with employee freedom of choice during the election, and which therefore warranted setting aside the results of the election. The General Counsel argues that such material issues have been previously decided, that there are no litigable issues of fact, and thus that the Board should grant the Motion for Summary Judgment. We agree with the General Counsel.

Our review of the record herein, including the record in Case 31--RC--5141, discloses that pursuant to a representation petition filed on July 9, 1981, the Regional Director for Region 31 approved a Stipulation for Certification Upon Consent Election entered into by Respondent and the Union. Said stipulation was approved on July 15, 1981. Thereafter, an election conducted pursuant to the Stipulation for Certification Upon Consent Election on August 18, 1981, resulted in a vote of 20 for, and none against, the Union, with 7 challenged ballots. On August 25, 1981, Respondent filed timely objections to conduct affecting the

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results of the election, alleging, in substance, that the Union made unlawful promises of benefits to employees, and pressured and coerced employees to vote for it, and that the Board agent conducting the election committed several improprieties.

After investigation, the Regional Director issued a Report on Objections on September 25, 1981, in which he recommended that Respondent's objections be rejected for its failure to serve the objections in a timely manner, and in which he further recommended that, were the Board to reach a different conclusion on the service of objections issue, the objections be overruled in their entirety and that the Union be certified.[3] Thereafter, Respondent filed exceptions to the Regional Director's report. On May 28, 1982, the Board, having considered the Regional Director's report, Respondent's exceptions thereto, and the entire record, adopted his findings but reversed his recommendation that the objections should be dismissed for failure of proper service.[4] However, the Board adopted the findings, conclusions, and recommendations of the Regional Director with respect to Respondent's Objection 1,[5] and certified the Union as the exclusive bargaining agent of employees in the unit stipulated to be appropriate.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a

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[3] On September 29, 1981, the Regional Director issued an erratum to the Report on Objections.

[4] Theta Cable of California, 261 NLRB No. 175 (Member Hunter concurring).

[5] The Board adopted pro forma, in the absence of exceptions, the Regional Director's recommendation to overrule Objections 2, 3, and 4.

respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[6]

Except as discussed below, issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

In its response to the Notice To Show Cause, Respondent simply renews it contention that its Objection 1 should be sustained and the results of the representation election set aside. As noted above, this issue was previously litigated, and Respondent has offered no evidence or special circumstances to require a result different from the one the Board reached before. However, in its answer to the complaint, but not reasserted in its response to the Notice To Show Cause, Respondent denies, inter alia, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act; that commencing on or about June 7, 1982, and continuing to date, the Union has requested, and is requesting,

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[6] See Pittsburgh Plate Glass Co. v. N.L.R.B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, as the exclusive collective-bargaining representative of employees in the appropriate unit; and that commencing on or about June 7, 1982, and at all times thereafter, Respondent refused, and continues to refuse, to recognize and bargain collectively with the Union. We conclude that these denials do not warrant a different result on the Motion for Summary Judgment.

Respondent denies the complaint allegation that it is an employer within the meaning of the Act on the ground that it claims the allegation was a conclusion of law, not a statement of fact. In entering into the Stipulation for Certification Upon Consent Election, Respondent agreed that it was an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. In its answer to the complaint, Respondent admits that it is a California corporation, which, in the course and conduct of its business operation, annually purchases and receives goods or services valued in excess of $50,000 directly from suppliers located outside the State of California; and annually derives gross revenues in excess of $500,000. We therefore find the complaint allegation that Respondent is an employer within the meaning of the Act has been established as true.

As to the issue of whether the Union requested and is requesting bargaining, and whether Respondent thereafter refused and continues to refuse to recognize or bargain with the Union, the Motion for Summary Judgment includes as an exhibit a letter,

dated June 7, 1982, from the Union to the Respondent in which, inter alia, the Union formally requested that bargaining with Respondent commence as soon as possible. The Motion for Summary Judgment also includes as an exhibit a letter, dated June 21, 1982, from Respondent to the Union in which, inter alia, Respondent declined to enter into collective-bargaining negotiations with the Union. In that letter, Respondent stated that, in order to secure court review of the Board's decision, it was required to refuse to bargain with the Union. Respondent has not denied the authenticity of these documents. Therefore we find the relevant complaint allegations involving them to be established as true.[7]

Accordingly, for the reasons stated above, we find that Respondent has at all times material herein refused to recognize and bargain with the Union, upon request, and that its refusal to do so is violative of Section 8(a)(5) and (1) of the Act.

On the basis of the entire record, the Board makes the following:

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[7] See, e.g., Hyatt Hotels, Inc., d/b/a Hyatt Regency Phoenix, 256 NLRB 1099, 100--01 (1981). In denying the allegation that it refused to bargain, it appears that Respondent is challenging only the alleged date of the refusal, and not the fact that it refused to bargain. Although the complaint alleges that Respondent refused to bargain with the Union on June 7, 1982, Respondent's letter in which it stated its refusal to bargain is dated June 21, 1982. Both the General Counsel and Respondent relied on that letter in framing the complaint and answer. We thus find that Respondent refused and continues to refuse to bargain from June 21, 1982.

Findings of Fact

I. The Business of Respondent

Respondent is, and has been at all material times herein, a corporation duly organized under and existing by virtue of the laws of the State of California, with an office and principal place of business located in Santa Monica, California, where it is engaged in the operation of a cable television system. Respondent, in the course and conduct of its business operations, annually, and therefore during the 12-month period preceding the issuance of the complaint, a representative period, purchased and received goods or services valued in excess of $50,000 directly from suppliers located outside the State of California. Also during this same time period, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All studio employees employed in the production of video tape programs, in maintenance and in broadcast engineering, employed at the Employer's Santa Monica and Ontario, California, facilities, but excluding all supervisors, guards, clerical employees, janitors and employees in the department known as ''Public Access.''

2. The certification

On August 18, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 31, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on May 28, 1982, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Commencing on or about June 7, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about June 21, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive

representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since June 21, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the

initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962); Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Group W Cable, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All studio employees employed in the production of video tape programs, in maintenance and in broadcast engineering, employed at Respondent's Santa Monica and Ontario, California, facilities, but excluding all supervisors, guards, clerical employees, janitors and employees in the department known as ''Public Access,'' constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since May 28, 1982, the above-named labor organization has been and now is the certified and exclusive representative of

all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about June 21, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Group W Cable, Inc., Santa Monica, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Alliance of Theatrical Stage Employees and

Moving Picture Machine Operators of the United States and Canada, AFL--CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All studio employees employed in the production of video tape programs, in maintenance and in broadcast engineering, employed at Respondent's Santa Monica and Ontario, California, facilities, but excluding all supervisors, guards, clerical employees, janitors and employees in the department known as ''Public Access.''

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Santa Monica and Ontario, California, facilities copies of the attached notice marked ''Appendix.''[8] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days

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[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. October 25, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL--CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All studio employees employed in the production of video tape programs, in maintenance and in broadcast engineering, employed at the Employer's Santa Monica and Ontario, California, facilities, but excluding all supervisors, guards, clerical employees, janitors and employees in the department known as ''Public Access.''

GROUP W CABLE, INC.

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 12100, 11000 Wilshire Boulevard, Los Angeles, California 90024, Telephone 213--824--7357.